Re PERTING TIMOR ELECTION 1961; KAM AH CHAI v. CHAI KIA POH

[O.C.J. (Ong J.) May 28, 1962]

[K.L. — Election Petition No. 6 of 1961]

Election Petition — Objection under reg. 11(1)(c) and (3)(c), Local Government (Conduct of Elections) Regulations, 1960 — Disqualification under Order 5(d) of Town Council of Bentong Order, 1960 — Local Government Elections Act, 1960, 1st Schedule, para. 2 — Whether Returning Officer competent to decide on language disqualification.

The petitioner was one of those who voted at the election for the Electoral Ward of Perting Timor, Bentong, held on May 20, 1961. At the said election the respondent and one C.T.N. were candidates, and the Returning Officer had returned the respondent as having been duly elected. The result of the election was duly published in the *Pahang Government Gazette* of August 3, 1961. On August 24, the petitioner presented this petition praying that it might be determined that the respondent was not duly elected and that the election was void. From the affidavits it was clear that C.T.N. objected to the respondent's nomination paper under reg. 11(3)(c) of the Local Government (Conduct of Elections) Regulations, 1960, on the ground that he was disqualified under Order 5(d), Town Council of Bentong Order, 1960, and that the Returning Officer had informed the objector that he (the Returning Officer) was not competent to conduct the language test on the respondent, with the result that no action was taken on the objection. At the hearing of the petition a preliminary objection was raised by counsel for the respondent that the decision of the Returning Officer in overruling the objection of C.T.N. was final and conclusive and was not to be called in question in any Court under reg. 11(5) of the Local Government (Conduct of Elections) Regulations, 1960.

Held: the effect of Order 5(d) read with reg. 11(1)(c) is that while the Returning Officer at a local government elections is competent to give an immediate and final decision on any of the grounds of disqualification specified in para. 2 of the First Schedule to the Local Government Elections Act, 1960, any decision involving the language disqualification must be stayed pending the verdict of the State Secretary or his appointee as to the candidate's linguistic proficiency. The Returning Officer in this case quite rightly announced that he was not competent to conduct the language test and took no action on the objection. Refraining from making any decision on the objection is not the same thing as overruling the objection, even if the petitioner had said by mistake that his objection had been overruled. As the Returning Officer had not arrogated to himself competency to decide on the objection reg. 11(5) had no application in this case.

Yap Choon Kong & Ors. v. *Returning Officer, Kluang* (1) dissented from.

Case referred to:—

(1) *Yap Choon Kong & Ors.* v. *The Returning Officer, Kluang & Ors.*, [1962] M.L.J. 19.

ELECTION PETITION.

S. E. Teh for the petitioner.

K. A. Menon for the respondent.

Cur. Adv. Vult.

Ong J.: The question raised in this election petition concerns the interpretation and application of certain provisions of the written law with regard to the language qualification of candidates in local government elections.

The petitioner was one of those who voted at the election for the Electoral Ward of Perting Timor, Bentong, Pahang, held on May 20, 1961; he is consequently a person entitled to present this petition under section 34 of the Election Offences Ordinance, 1954. At the said election the respondent and one Chow Tek Noe were candidates, and the Returning Officer had returned the respondent as having been duly elected. The result of the election was duly published in the *Pahang Government Gazette* of August 3, 1961 and on August 24, 1961 the petitioner presented this petition praying that it might be determined that the respondent was not duly elected and that the election was void.

In the petition it was stated that on nomination day, April 19, 1961, an objection was lodged with the Returning Officer that the respondent "should be disqualified" to stand for election under Order 5(d) of the Town Council of Bentong Order, 1960, as he was not able to speak, read and write Malay or English language; that "the objection was overruled" by the Returning Officer without any enquiry; that notice of the objection was conveyed by letter dated April 21, 1961 to the State Secretary, Pahang, who on May 1, 1961 replied to the writer informing him to invoke the provisions of section 32(c) of the Election Offences Ordinance, 1954.

The statement as above set out, however, is not strictly accurate. This clearly appears from two affidavits on the record, sworn respectively by the petitioner and by the unsuccessful candidate, Chow Tek Noe, on October 21 and October 19, 1961. To be more precise, the facts, which were not disputed by the respondent in his affidavit in reply, disclose, first, that the respondent's opponent, Chow Tek Noe, objected to the former's nomination paper under reg. 11(1)(c) of the Local Government (Conduct of Elections) Regulations, 1960 on the ground that he was disqualified (not "should be disqualified") under Order 5(d) of the Town Council of Bentong Order, 1960; secondly, that the Returning Officer informed the objector that he, the Returning Officer, was not competent to conduct the language test on the respondent, with the result that no action was taken on the objection.

At the hearing of this petition counsel for the respondent raised a preliminary objection to the jurisdiction of the Court on the ground that "since the objection of the said Chow Tek Noe was overruled by the Returning Officer, then, by virtue of regulation 11(5) of the Local Government (Conduct of Elections) Regulations, 1960, the decision of the Returning Officer was final and conclusive for the purposes of the election in respect of which the proceedings were held and shall not be called in question in any Court." Other objections to this petition were raised by the respondent in his affidavit of November 25, 1961 in reply to the affidavits of the petitioner and Chow Tek Noe, but they had been abandoned by counsel at the previous hearing of a summons for directions and do not call for any comment. It is, however, pertinent to observe that the respondent's said affidavit in reply does not

traverse or answer the petitioner's allegations as to his language qualifications.

In my opinion the answer to the preliminary objection is to be found in the provisions of Order 5(d) itself. This Order is as follows:

"5. Subject to the provisions of the Act, a person shall be disqualified for being a Councillor if —

xxx xxx xxx xxx

(d) he is not able to speak and, unless incapacitated by blindness or other physical cause, is not able to read and write the Malay or English language with a degree of proficiency sufficient, in the opinion of the State Secretary or any person appointed by the State Secretary in that behalf, to enable him to take an active part in the proceedings of the Council;"

The degree of proficiency required of a candidate is not that of any standard or academic test. The final arbiter on the question is the State Secretary or some other person appointed by the State Secretary in that behalf. Therefore, in the absence of any evidence that the Returning Officer at the Bentong election was a person so appointed by the State Secretary for Pahang, he clearly had no authority whatsoever to decide whether the respondent or any other candidate was "disqualified under section 6 of the Act from being a Councillor" (*vide* para. (e) of regulation 11(1) of the Local Government (Conduct of Elections) Regulations, 1960).

In other words, the effect of Order 5(d) read with regulation 11(1)(e) is that, while the Returning Officer at local government elections is competent to give an immediate and final decision on any of the grounds of disqualification specified in paragraph 2 of the First Schedule to the Local Government Elections Act, 1960, any decision involving the language disqualification must be stayed pending the verdict of the State Secretary, or his appointee, as to the candidate's linguistic proficiency. If delay results from the provisions of Order 5(d), it cannot be helped, since an obvious solution offers itself by appointing the Returning Officer to conduct the language test. Any argument *ab inconvenienti* is irrelevant. The result follows that, because the decision was not his to make, the Returning Officer in this case quite rightly announced that he was not competent to conduct the language test and took no action on the objection. Refraining from making any decision on the objection is not the same thing as overruling the objection, even if the petitioner had said by mistake that his objection had been overruled. As the Returning Officer had not arrogated to himself competency to decide on the objection, I hold that regulation 11(5), which states that "the decision of the Returning Officer shall be final and conclusive . . . and shall not be called in question in any court," has no application whatsoever.

I am aware that in coming to the above conclusion I am not in accord with the opinion of Adams J. in *Yap Choon Kong & Ors.* v. *The Returning Officer, Kluang & Ors.* [1], but, with all respect, I take a different view for the reason that I am unable to agree with the arguments of Dato Jackson in that case.

Section 32 of the Election Offences Ordinance, 1954, provides for the election of a candidate at any election to be declared void on an election petition on any of five grounds which may be proved to the satisfaction of the Election Judge. One of these grounds, set out in paragraph (e), is "that the candidate was at the time of his election a person disqualified for election." Since I hold that regulation 11(5) of the Local Government (Conduct of Elections) Regulations, 1960 has no application, I overrule the respondent's objection to the jurisdiction.

The hearing of the petition will be resumed on a date to be fixed. In the meantime, it is ordered that the State Secretary, Pahang, appoint the earliest convenient date and place for testing the respondent's linguistic proficiency, either by himself or by some other person appointed by him in that behalf.

Costs reserved.

Order accordingly.

Solicitors: *Allen & Gledhill; Braddell & Ramani.*

PANG PO & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Suffian J.) June 7, 1962]

[K.L. — Criminal Appeal No. 19 of 1962]

Customs and Excise — "Uncustomed goods" — "Import" — Goods concealed in vessel in territorial waters — Irrebuttable presumption — Goods in transit — Customs Ordinance, 1952, ss.2, 43, 105(3) and 131(1)(d).

Criminal Law and Procedure — Sentence — Transient offenders.

The appellants were two firemen on the *Straat Mozambique*, which was on her way from Japan to South America. In Japan the appellants accepted certain goods from a person to be delivered to another person at the port of Santos in South America. The existence of these goods on the boat was not known to the captain of the ship, and none of them appeared in the ship's manifest or in the list of dutiable goods in the possession of the crew signed by each of them. On December 21, 1961, the ship called at Port Swettenham and these goods were found by the Customs hidden in the cofferdam tank in the engine room. The appellant each made a confession admitting possession of these goods but stated that they were not meant to be imported into Malaya as they were to be delivered to someone in Santos. On these facts they were jointly convicted of two offences, of being in possession of uncustomed goods contrary to section 131(1)(d) of the Customs Ordinance, 1952.

Held: in this case all the prosecution need prove were: (a) possession, and (b) the offending goods were uncustomed goods. As possession was admitted and an irrebuttable presumption having arisen that the goods were uncustomed goods under section 105(3) of the Ordinance the appellants were rightly convicted.

CRIMINAL APPEAL.

Lall Singh Muker for the appellants.

H. Sankey (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian J.: The two appellants were firemen on the *Straat Mozambique*. The boat set out